

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA**

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**STATE OF OKLAHOMA, *et al.*,**

*Plaintiffs,*

*v.*

**TYSON FOODS, INC., *et al.*,**

*Defendants.*

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) **Case No. 4:05-cv-00329-GKF-SAJ**  
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**DEFENDANTS' REPLY IN SUPPORT OF MOTION TO COMPEL PRODUCTION  
OF PLAINTIFFS' WORKING MODELS [DKT #1721]**

Defendants respectfully submit this joint reply to inform the Court of recent developments with respect to their Motion to Compel Production of Plaintiffs' Working Models (Dkt #1721) ("Motion to Compel").

Contrary to Plaintiffs' repeated representations to the Defendants and this Court, Plaintiffs have recently acknowledged their failure to produce several critical files and materials related to the environmental models used by Plaintiffs' experts. Without these missing files, it was impossible for defense experts to reproduce the working models used by Drs. Wells' and Engel, despite hundreds of hours of effort. Plaintiffs have now agreed to produce the omitted materials, all of which are responsive to the present Motion to Compel. However, Plaintiffs' late production cannot cure the prejudice suffered by Defendants. More than seven weeks of Defendants' and their experts' time has been wasted attempting to complete the admittedly impossible task of reproducing Plaintiffs' models using incomplete and inaccurate files and information. Accordingly, Defendants reassert their outstanding request for an award of fees and costs incurred as a result of Plaintiffs' faulty production. More importantly, Defendants further

request that the Court address the time delays associated with this matter in the related motion to extend the deadline to file Defendants' expert reports.<sup>1</sup>

### **I. Plaintiffs' Failure to Produce Integral Files and Materials Responsive to Defendants' Motion to Compel.**

From the outset of this discovery dispute, Plaintiffs have denied that any deficiency existed in their production of materials related to the environmental models used by Drs. Wells and Engel. In so doing, Plaintiffs affirmatively represented to the Court and Defendants on numerous occasions that all of the requested files necessary to run Drs. Wells' and Engel's models had already been produced, and even filed a motion to strike Defendants' pleadings seeking production of those files.<sup>2</sup> Now, more than seven weeks after Defendants' initial request, and almost one month after the filing of this Motion to Compel, Plaintiffs have finally

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<sup>1</sup> See Defs.' Joint Mot. for Additional Time (June 12, 2008, Dkt #1722); Defs.' Reply in Support of Joint Mot. for Additional Time (July 14, 2008, Dkt #\_\_\_).

<sup>2</sup> See July 7, 2008 Email from D. Page to J. Jorgensen, et al. ("Frankly, my experts tell me that a reasonably knowledgeable grad student could have had their models running in a couple of days.") (attached as Exh. A); Pls.' Opp. to Defs.' Mot. to Compel, at 5 (June 30, 2008, Dkt #1737) ("Defendants have all of the tools necessary to run Dr. Wells' and Dr. Engel's models"); June 30, 2008 Email from L. Ward to J. Jorgensen ("You have had working copies of Dr. Engel's modeling work since at least May 22. You have had working copies of Dr. Wells' modeling work since at least May 29. . . . We frankly do not understand what additional questions you could possibly have regarding these issues.") (attached as Exh. B); June 26, 2008 Email from L. Ward to J. Jorgensen ("Defendants have been provided with all the tools necessary to run the models that are the subject of Defendants' Motion to Compel.") (attached as Exh. C); Pls.' Mot. to Strike Defs.' Mot. to Compel, at 2 (June 18, 2008, Dkt #1727) ("requested files *had already been produced* and could run the water quality models used by [sic] Plaintiff's experts") (emphasis in original); June 18, 2008 Ltr. from D. Page to M. Bond, at 2 ("the State did produce the models in Drs. Engel and Wells considered materials as they were kept on their respective computers") (Dkt #1743 Exh. K); June 13, 2008 Ltr. from D. Page to M. Bond, at 1 ("these materials were produced as part of their considered materials along with their expert reports . . . any experienced WQ Modeler should be able to run them as they were used by the experts") (Dkt #1743 Exh. J); June 2, 2008 Email from D. Page to M. Bond and R. George ("the information you requested has been produced as considered materials") (Dkt #1743 Exh. E); May 29, 2008 Email from D. Page to M. Bond and R. George ("all of the 'documents' . . . concerning the modeling information should be included in the 'considered materials' produced with Dr Engel's and Dr Wells' expert reports") (Dkt #1743 Exh. C); Decl. of Jay T. Jorgensen, at ¶¶ 6, 8-10, 14 (Dkt #1743 Exh. B) ("Jorgensen Decl.").

acknowledged that it is impossible to reconstruct Drs. Wells' and Engel's models and reproduce the results in their expert reports using the materials produced to date.

Despite having satisfied their meet and confer obligations prior to filing the present Motion to Compel, Defendants have continued to make every effort to resolve this dispute without court intervention. *See* Defs.' Opp. to Pls.' Mot. to Strike, at 2-6 (July 7, 2008, Dkt #1743). As a part of this effort, Defendants suggested several alternative methods through which defense experts would be able to obtain sufficient information to reproduce working copies of the models, including (i) limited depositions of Plaintiffs' modeling experts; or (ii) receipt of written protocols for assembling the working models. *See* Jorgensen Decl. at ¶ 13. In response, Plaintiffs offered to arrange a teleconference between Defendants' modeling experts and Drs. Wells and Engel on July 10th and 11th, respectively. *See* July 4-9, 2008 Emails between J. Jorgensen and D. Page, et al. (attached as Exh. D).

During the course of these conference calls, Drs. Wells and Engel each acknowledged that several critical files and materials were either missing from Plaintiffs' production of their considered materials, or were produced in an incomplete or incorrect manner. For example, with respect to Dr. Wells' model, three essential groups of files were missing from Plaintiffs' previous productions. *See* Fourth Declaration of Dr. Victor J. Bierman, Jr., at ¶ 9 ("Fourth Bierman Decl.") (attached as Exh. E). Moreover, some of the information that Plaintiffs provided to Defendants in response to our assertions that the models could not be assembled was found to be incorrect. *See id.* at ¶ 8. Similarly, with respect to Dr. Engel's models, a list of essential materials were omitted from Plaintiffs' productions to date, and some of the files that had previously been produced were either the incorrect version or needed modifications. *See id.* at ¶¶ 11-14. As Dr. Bierman explains in his attached declaration, the omitted materials were critical

components of Plaintiffs' models. Without these missing files and materials, it was impossible for defense experts to reconstruct Plaintiffs' models in a manner that would reproduce the results contained in Plaintiffs' expert reports. *See id.* at ¶¶ 8, 16. Further, additional time was wasted attempting to assemble Plaintiffs' models using the faulty instructions provided in response to Defendants' inquiries. *See id.* at ¶ 16.

Plaintiffs have now agreed to produce the omitted materials identified during the conference calls and have started that process of production. *See* July 10-11, 2008 Emails between D. Page and R. George, et al. (attached as Exh. F); July 12, 2008 Email from R. George to D. Page, et al. (attached as Exh. G); Fourth Bierman Decl. at ¶¶ 10, 15. Upon receipt of these materials, defense experts must start over at square one of their analysis, and once again attempt to assemble the working models used by Plaintiffs' experts. *See id.* at ¶ 17.

Given Plaintiffs' untimely production, Defendants propose to report back to the Court following the completion of this process in order to confirm that Plaintiffs have indeed produced all materials responsive to the present Motion to Compel. To that end, Defendants request that the Court stay any order on Defendants' motion to compel until that time.

## **II. Defendants Have Suffered Prejudice as a Result of Plaintiffs' Untimely Production.**

As a result of Plaintiffs' failure to previously provide integral materials responsive to this Motion to Compel, Defendants have incurred significant expenses and delays in struggling to reproduce and analyze the working models used by Plaintiffs' experts. For instance, Defendants' modeling expert, Dr. Bierman, and his staff have wasted seven weeks in what has now been recognized as a futile attempt to reproduce the models using incomplete and inaccurate files and information. *See id.* at ¶ 16. This has not been idle time. Indeed, Dr. Bierman and his staff have worked many late hours and weekends trying to accomplish the very first task in their expert

work – assembling Plaintiffs’ models for testing. *See id.* Had Plaintiffs merely reassessed their production at any time during this seven-week period – rather than chastising Defendants for their requests,<sup>3</sup> and engaging in unnecessary and unfounded motion practice<sup>4</sup> – the parties, their experts and the Court would have doubtlessly saved significant time and resources. Instead, Dr. Bierman must now start over.

In light of Plaintiffs’ recent untimely production, Defendants’ reassert their outstanding request for an award of the fees and costs associated with Dr. Bierman’s attempts to reassemble Plaintiffs’ models, and the expenses created in bringing this Motion to Compel and defending against Plaintiffs’ unfounded Motion to Strike. Where, as here, “the disclosure of requested discovery is provided after the motion [to compel] was filed,” the Federal Rules expressly mandate that “the court must, after giving an opportunity to be heard, require the party . . . whose conduct necessitated the motion, the party, or attorney advising that conduct, or both to pay the movant’s reasonable expenses incurred in making the motion, including attorney’s fees.” Fed. R. Civ. P. 37(a)(5)(A); *see* May 20, 2008 Op. and Order (Dkt #1710) (“The court finds that some of the data that should have been produced was not produced until after the motion to compel was filed and that the Federal Rules require the court to address an appropriate remedy.”).<sup>5</sup> Plaintiffs’ recent production cannot cure the prior discovery failings either, as Plaintiffs cannot

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<sup>3</sup> *See, e.g.*, July 7, 2008 Email from D. Page to J. Jorgensen, et al. (“Frankly, my experts tell me that a reasonably knowledgeable grad student could have had their models running in a couple of days.”) (attached as Exh. A); June 30, 2008 Email from L. Ward to J. Jorgensen (“You have had working copies of Dr. Engel’s modeling work since at least May 22. You have had working copies of Dr. Wells’ modeling work since at least May 29. . . . We frankly do not understand what additional questions you could possibly have regarding these issues.”) (attached as Exh. B).

<sup>4</sup> *See, e.g.*, Pls.’ Mot. to Strike Defs.’ Mot. to Compel, at 2 (June 18, 2008, Dkt #1727).

<sup>5</sup> The Rule requires an award of expenses unless the district court specifically finds that an exception applies. *See Harolds Stores, Inc. v. Dillard Dep’t Stores, Inc.*, 82 F.3d 1533, 1555 (10th Cir. 1996).

moot a motion to compel by producing demanded materials after the motion is filed. *See Augustine v. Adams*, 169 F.R.D. 664, 666 (D. Kan. 1996); *McDonald v. HCA Health Servs. of Okla., Inc.*, 2006 U.S. Dist. LEXIS 89798, at \*9-10 (W.D. Okla., Dec. 11, 2006) (awarding attorney's fees where portion of production was made after motion to compel was filed). Further, any insinuation that Defendants somehow failed to satisfy their meet and confer obligations prior to filing this Motion to Compel is contradicted by the timeline of events preceding this filing,<sup>6</sup> as well as the more than seven weeks of unfounded refusals and incorrect representations made by Plaintiffs in connection with this matter.<sup>7</sup>

Finally and most importantly, Defendants request that the Court address the time delays arising from Plaintiffs' untimely production in the related motion to extend the deadline to file Defendants' expert reports. *See* Defs.' Joint Mot. for Additional Time (June 12, 2008, Dkt #1722); Defs.' Reply in Support of Joint Mot. for Additional Time (July 14, 2008, Dkt #\_\_\_). Before he knew that he would encounter a seven-week delay on the first step of his analysis, Dr. Bierman filed a declaration stating that he needed a reasonable extension of the deadline for his report. With diligent work, Dr. Bierman testified that he could submit his report on or before January 5, 2009. *See* Decl. of Dr. Victor J. Bierman, Jr., at ¶ 15 (Dkt #1722 Exh. 7). That request is all the more reasonable and imperative now that Dr. Bierman's team has been unjustifiably delayed by seven weeks.

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<sup>6</sup> *See generally* Defs.' Opp. to Pls.' Mot. to Strike (July 7, 2008, Dkt #1743).

<sup>7</sup> It is unclear whether Plaintiffs' will withdraw their counter-request for costs in responding to this Motion to Compel, after their recent admission that responsive materials were not previously produced. *See* Pls.' Opp. to Defs.' Mot. to Compel, at 6-7 (June 30, 2008, Dkt #1737). Nevertheless, to the extent that Plaintiffs continue to assert this request, it should be rejected. Plaintiffs' assertions that this motion was "premature" and "unfounded" are clearly contradicted by the recent developments detailed herein. In such circumstances, the Federal Rules explicitly grant the requesting party – not the delinquent producing party – with the right to recover costs and fees. *See* Fed. R. Civ. P. 37(a)(5)(A).

**Conclusion**

For the foregoing reasons, Defendants request that the Court stay an order requiring further production of materials responsive to Defendants' Motion to Compel, pending Defendants' analysis of Plaintiffs' recent production. Defendants also respectfully request that the Court award the fees and costs incurred by Defendants to date in connection with Plaintiffs' faulty production.<sup>8</sup> Finally, Defendants ask the Court to address the time delays and prejudice to Defendants associated with this matter in considering the related motion to extend the deadline to file Defendants' expert reports.

Respectfully submitted,

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<sup>8</sup> If the Court awards these costs, Defendants will work with Plaintiffs to agree upon the appropriate amount of the award based on the time and expenses expended.

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